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Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-752

NATIONAL LABOR RELATIONS BOARD,

Petitioner,

v.

THE CATHOLIC BISHOP OF CHICAGO, a corporation sole,
and
DIOCESE OF FORT WAYNE-SOUTH BEND, INC., *et al.*,

Respondents.

BRIEF ON BEHALF OF THE ROGER BALDWIN FOUNDATION OF THE AMERICAN CIVIL LIBERTIES UNION, INC., ILLINOIS DIVISION, AMICUS CURIAE

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INTEREST OF THE AMICUS CURIAE

The Roger Baldwin Foundation of the ACLU, Inc. is a non-partisan, not-for-profit Illinois corporation whose purpose is to defend the liberties guaranteed by the Bill of

Rights. The First Amendment's protection of the Free Exercise of religion is of particular concern to the Roger Baldwin Foundation, which has filed briefs advocating the protection of religious freedom in numerous other cases. This brief *amicus curiae* is submitted because of the importance of the First Amendment question presented.*

STATEMENT OF FACTS AND QUESTIONS PRESENTED

The facts are set forth in detail in the briefs of the parties and will not be repeated here. The question presented is whether the National Labor Relations Board, ("the Board") can constitutionally compel schools operated, directed and financed by the Roman Catholic Church to bargain collectively with the lay teachers which they employ.

* Consents of the parties have been filed with the Clerk of this Court.

SUMMARY OF ARGUMENT

1. The Free Exercise Clause of the First Amendment to the United States Constitution prohibits the government from "intermeddling" with, "coercing," "intruding" upon, or becoming "entangled" in the free exercise of religious belief. *Lemon* v. *Kurtzman,* 403 U.S. 602, 620 (1971); *Abington School District* v. *Schempp,* 374 U.S. 203, 223 (1963); James Madison, *Memorial and Remonstrance Against Religious Assessments,* II Madison 183-191 (1785). The Free Exercise Clause is violated not only by acts which are intended to intermeddle with or coerce religious belief, but also by those which have the prohibited effect. *Wisconsin* v. *Yoder,* 406 U.S. 205 (1972); *Walz* v. *Tax Commission of New York,* 397 U.S. 664, 669 (1970). The facts in this case demonstrate that the prohibited interference has, must and will inevitably occur.

2. In exercising its jurisdiction, the National Labor Relations Board (the "Board") has attempted to distinguish between schools which are "exclusively religious" and those which are "religiously associated." This purported distinction is unsound as a matter of fact and untenable as a principle of law. *Meek* v. *Pittenger,* 421 U.S. 349, 366 (1975); *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973); *Lemon* v. *Kurtzman,* 403 U.S. 602, 616-9 (1971). It has been repeatedly rejected by this Court in cases arising under both the Establishment and Free Exercise Clauses of the First Amendment. *Committee for Public Education* v. *Nyquist,* 413 U.S. 756, 780 (1973); *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953); *Follett* v. *McCormick,* 321 U.S. 573, 576 (1944); *Murdock* v. *Pennsylvania,* 319 U.S. 105, 110

(1943). It offers no justification for the jurisdiction of the Board over schools which are an integral part of the religious mission of the Catholic Church.

3. The practical effect of the assumption of jurisdiction by the Board in these circumstances is clearly coercive. The Board's interrogation of clergymen about the principles of their faith, its investigation and interpretation of religious doctrine and the resulting participation by the Board in the affairs of religious organizations, are all repugnant to the First Amendment. *Lemon* v. *Kurtzman*, 403 U.S. 602, 620 (1971); *Watkins* v. *United States*, 354 U.S. 178, 197 (1957); *Fowler* v. *Rhode Island*, 345 U.S. 67, 70 (1953); *Everson* v. *Board of Education*, 330 U.S. 1, 16 (1946); *Watson* v. *Jones*, 13 Wall. 679, 733-34 (1871). Such prohibited coercion is not merely theoretical but has already occurred. Its continuation is inevitable unless the Seventh Circuit's decision is upheld.

4. The prohibited interference is not simply the result of inept administration by the Board, but is an inevitable result of the assumption of jurisdiction by the Board. Under Catholic canon law the resident bishop is given authority to manage the schools. The compulsory collective bargaining mandated by the National Labor Relations Act unconstitutionally interferes with that authority. *Serbian Eastern Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696, 713 (1976); *Lemon* v. *Kurtzman*, 403 U.S. 602, 619 (1971); *Presbyterian Church* v. *Blue Hull Memorial Presbyterian Church*, 393 U.S. 440, 450 (1969). The Board cannot avoid the prohibited interference by administrative self-restraint. *Engel* v. *Vitale*, 370 U.S. 421, 430 (1962).

ARGUMENT

I. THE FIRST AMENDMENT PROHIBITS THE GOVERNMENT FROM "INTERMEDDLING" WITH, "COERCING," "INTRUDING" UPON, OR BECOMING "ENTANGLED" IN THE FREE EXERCISE OF RELIGION.

The Free Exercise Clause of the First Amendment prohibits the government from "intermeddling" with, "coercing," "intruding" upon, or becoming "entangled" in the free exercise of religious belief.* *Lemon* v. *Kurtzman*, 403 U.S. 602, 620 (1970); *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963); James Madison, *Memorial and Remonstrance Against Religious Assessments*, II Madison 183-191 (1785). The Free Exercise Clause is violated not only by acts which are intended to intermeddle with or coerce religious belief, but by those which have the prohibited effect.** *Wisconsin* v. *Yoder*, 406 U.S. 205, 220 (1972).

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* This Court has indicated that the distinction between the Free Exercise Clause and the Establishment Clause rests on the difference between advancement of religion on the one hand and inhibition of its exercise on the other. A violation of the Free Exercise Clause "is predicated on coercion while the Establishment Clause violation need not be so attended." *Abington School District* v. *Schempp*, 374 U.S. 203, 223 (1963); see also *Engel* v. *Vitale*, 370 U.S. 421, 430-31 (1962). Although "the two clauses may overlap," *Schempp, supra*, 374 U.S. at 223, and therefore Establishment Clause cases will be discussed herein where appropriate, we regard this as essentially a "Free Exercise" case.

** Many neutral government regulations, such as fire and safety codes, do not unconstitutionally interfere with the Church's authority over its schools or the content of religious education and are not subject to challenge. In this case, however, the Board's orders compelling respondents to bargain with their teachers directly diminish the authority of the Church, through its resident Bishops, to control its teachers and the content of classroom education. See pp. 14-21, *infra*.

> The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play in the joints productive of a beneficial neutrality which will permit religious exercise to exist without sponsorship and without interference.
>
> Each value judgment under the Religion Clauses must therefore turn on whether the particular acts in question are intended to establish or interfere with religious beliefs or have the effect of doing so. *Walz* v. *Tax Commission of New York,* 397 U.S. 664, 674 (1970).

Religious freedom, as a First Amendment right, occupies a preferred position among constitutional freedoms, *Follett* v. *McCormick,* 321 U.S. 573, 575 (1944); *Murdock* v. *Pennsylvania,* 319 U.S. 105, 115 (1943), and the prohibition against interference with its exercise is to be given a broad interpretation. *Everson* v. *Board of Education,* 330 U.S. 1, 14-15 (1946); *McGowan* v. *Maryland,* 366 U.S. 420, 422 (1960). The protected exercise of religion includes not only dissemination and propagation of religious ideas, but also the appointment of clergy and matters of church administration. *Gillette* v. *United States,* 401 U.S. 437, 462 (1971); *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94, 107 (1952).

James Madison recognized the evils at which the Free Exercise Clause is aimed almost two hundred years ago in his *Memorial and Remonstrance Against Religious Assessments.* He insisted upon "the forbearance of our laws to intermeddle with Religion," and emphasized that matters of faith should be free from the cognizance of the state:

> We maintain therefore that in matters of Religion, no man's right is abridged by the institution of Civil Society, and that Religion is wholly exempt from its cognizance.*

Similarly, Thomas Jefferson repeatedly expressed the view that he considered the government "as interdicted by the Constitution against intermeddling with religious institutions, their doctrines, disciplines, or exercises." Lee, *Crusade Against Ignorance,* 70 (1961); *See* II Boyd, *The Papers of Thomas Jefferson,* 547 (1950). And in *Lemon* v. *Kurtzman,* 403 U.S. 602, 620 (1971), this Court employed terms of closely similar meaning:

> This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the Constitution forbids.

In this case, as discussed below, the activities of the Board have, must, and inevitably will interfere with the free exercise by respondents and others of their religions.

II. THE BOARD'S PURPORTED DISTINCTION BETWEEN SCHOOLS WHICH ARE "COMPLETELY RELIGIOUS" AND THOSE WHICH ARE "RELIGIOUSLY ASSOCIATED" IS UNTENABLE AS A MATTER OF FACT AND WITHOUT MERIT AS A PRINCIPLE OF LAW.

The Board's determination to assert jurisdiction over the parochial schools involved in this case results from a purported distinction between institutions which are "com-

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* Madison's *Memorial and Remonstrance* (1785) is set forth as an Appendix to the dissent of Mr. Justice Rutledge in *Everson* v. *Board of Education,* 330 U.S. 1 (1946). The quoted passages appear at 330 U.S. 64 and 69.

pletely religious'' and those which are ''religiously associated''.* See, e.g. *Association of Hebrew Teachers,* 210 NLRB 1053, 1058 (1974); *Board of Jewish Education,* 210 NLRB 1037 (1974); *Roman Catholic Archdiocese of Baltimore,* 216 NLRB 249 (1975). In *Cardinal Timothy Manning,* 223 NLRB 1218 (1976), for example, the Board held that Roman Catholic schools are merely religiously associated, not completely religious, because they ''perform in part the secular function of educating children.'' The schools involved here, says the Board, are ''religiously affiliated'' because, in addition to training in religious faith and practices, they also provide classes in secular subjects and ''a variety of extracurricular activities.'' (Petitioner's Brief, pp. 5-6, 8; Petition for Certiorari, p. 5).

The distinction proposed by the Board is untenable as a matter of fact and without merit as a matter of law. First, as has been repeatedly pointed out by this Court, the secular functions of Roman Catholic parochial schools are ''intertwined'' with and ''subsumed'' in their religious mission:

> The Church-related elementary and secondary schools . . . typify such religion-pervasive institutions. The very purpose of many of those schools is to provide an integrated secular and religious education; the teaching process is, to a large extent, devoted to the inculcation of religious values and belief. . . . [T]he secular education those schools provide goes hand in hand with the religious mission which is the only reason for the schools' existence. Within the institution, the two are inextricably intertwined. *Meek* v. *Pittenger,* 421 U.S. 349, 366 (1975).
>
> Religion is so pervasive that a substantial portion of [the schools'] functions are subsumed in the religious mission. *Hunt* v. *McNair,* 413 U.S. 734, 743 (1973).

Second, Catholic school teachers necessarily teach even secular subjects in a manner infused with religious content. That this is so has, in fact, been several times remarked upon by this Court:

> It would simply ignore reality to attempt to separate secular religious functions from the predominantly religious role performed by many of Pennsylvania's church-related elementary and secondary schools. . . . *Meek* v. *Pittenger, supra,* 421 U.S. 349, 365 (1975).
>
> It is well known that everything taught in most parochial schools is taught with the ultimate goal of religious education in mind. *Lemon* v. *Kurtzman,* 403 U.S. 602, 634-5 (1971) (Douglas, J., concurring).

For these reasons the Board's position that ''We . . . do not agree that [parochial] schools are religious institutions intimately involved with the Catholic Church,'' *Cardinal Timothy Manning, supra,* 223 NLRB at 1218, is simply incorrect. This Court, in fact, has squarely held the contrary:

> [T]he District Court concluded that the parochial schools constituted ''an integral part of the religious mission of the Catholic Church.'' The various characteristics of the schools make them ''a powerful vehicle for transmitting the Catholic faith to the next generation.'' This process of inculcating religious doctrine

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* It should be noted, however, that the Board attributes no constitutional significance to its distinction. In its view, nothing but administrative discretion restrains it from asserting jurisdiction over *all* schools, even those which are ''completely religious'':

> The Board's determination does not rest on the premise that the Constitution draws a distinction between completely religious and other religious institutions, but rather reflects its judgment of how best to effect the policies of the Act. (Petition for Certiorari, p. 22, n.16; *see also,* Petitioner's Brief, p. 38, n.22).

> is, of course, enhanced by the impressionable age of the pupils, in primary schools particularly. In short, parochial schools involve substantial religious activity and purpose. *Lemon* v. *Kurtzman, supra,* 403 U.S. 602, 616 (1971).

Furthermore, the test previously applied by this Court in evaluating parochial schools is *not* a distinction between "religiously associated" and "completely *religious,*" but between religiously associated activities and exclusively *secular* functions. See, e.g., *Lemon* v. *Kurtzman,* 403 U.S. 602, 616 (1971); *New York* v. *Cathedral Academy,* 434 U.S. 125, 132-133 (1977). Thus, under the Establishment Clause it has been stated that the state may not constitutionally "blend secular and sectarian education," *Zorach* v. *Clauson,* 343 U.S. 306, 314 (1951); and financial aid to parochial schools has therefore been repeatedly struck down because it could not be confined to secular, neutral and non-ideological uses:

> In the absence of an effective means of guaranteeing that state aid derived from public funds will be used exclusively for secular, neutral and non-ideological purposes, it is clear from our cases that direct aid in whatever form is invalid. *Committee for Public Education* v. *Nyquist,* 413 U.S. 736, 780 (1973).

See also *Everson* v. *Board of Education,* 300 U.S. 1, 17-18 (1946) (the subject of government aid must "be indisputably marked off from the religious function").

The same principles have been applied under the Free Exercise Clause as well. In both *Follett* v. *McCormick,* 321 U.S. 573, 576 (1944) and *Murdock* v. *Pennsylvania,* 319 U.S. 105, 110 (1943), for example, licensing regulations which regulated the sale of religious literature in addition to "purely commercial" transactions were declared invalid as a violation of the Free Exercise Clause. And

in *Fowler* v. *Rhode Island,* 345 U.S. 67 (1953), the State of Rhode Island attempted to convict a minister of the Jehovah's Witnesses for giving what the State called an "address" in a public park. The State conceded that the park was open for "church services," and that the meeting at issue was "a religious one," 345 U.S. at 69, but contended nevertheless that because the minister's speech was not "religious worship" it could properly be prohibited. This argument, which *mutatis mutandis* is exactly the argument advanced by the Board, was squarely rejected by this Court:

> To call the words which one minister speaks to his congregation a sermon, immune from regulation and the words of another minister an address, subject to regulation, is merely an indirect way of preferring one religion over another. 345 U.S. at 69-70.

For the foregoing reason the distinction relied upon by the Board is without merit.

III. THE APPLICATION OF THE NATIONAL LABOR RELATIONS ACT TO ROMAN CATHOLIC PAROCHIAL SCHOOL TEACHERS HAS AND WILL INVOLVE THE BOARD IN THE INVESTIGATION AND INTERPRETATION OF RELIGIOUS DOCTRINE.

The Board recognizes that religious issues will arise in the context of compulsory collective bargaining with parochial school teachers. (Petitioner's Brief, p. 31). In fact, in its brief in the court below (p. 17) the Board conceded that "disputes in parochial schools may well involve issues of religious doctrine." Both common sense and the history of the Board's recently initiated involvement in this area demonstrate that its concession was clearly correct. It is clear, at the outset, that despite its pro-

fessed neutrality, the Board cannot even *decide* whether a school is "completely religious" without conducting the "extensive inquiry . . . into religious law and polity" which the constitution forbids. *Serbian Eastern Orthodox Diocese* v. *Milivojevich, supra,* 426 U.S. 696, 709 (1976).

In fact the Board has already conducted *precisely* such an inquiry *in this case.* After reversing the finding of its Acting Regional Director that the Quigley schools of Chicago were "intimately connected with the religious activities" of the Roman Catholic Church, the Board found that "the issues could best be resolved by a hearing" (Petition for Certiorari, p. 56a n.3). At the hearing the following questions, among others, were asked of the Church's witnesses:

(1) Whether under Church law the Archbishop of the Chicago Archdiocese was "performing his functions correctly . . . in the operation of the seminaries" (Tr. 62).

(2) What would be "a short definition possibly of immorality" (Tr. 93).

(3) Whether, under canon law, particular training would make an ordained priest "any less of a priest" (Tr. 309).

(4) Whether a mass would be a "less valid mass" if celebrated in a school auditorium (Tr. 566-7).

(5) How many "liturgies" are "required" at Catholic Parochial High Schools (Tr. 592-93).

(6) What a "positive value" in the priesthood is (Tr. 940).

(7) What the distinction between a "liturgy" and a "paraliturgy" is. To this question the witness was obliged to reply:

> To answer that question, I would practically have to give you a course in theology. (Tr. 635-6).

Both the intervening union and the Board contended that such inquiries are perfectly proper, thereby demonstrating a total miscomprehension of the constitutional principles to which this Court has repeatedly adhered. Thus, for example, the union asserted to the court below (Intervenor's Brief in No. 76-1600, p. 24) that "[The Board's] counsel's questions concerning religion related only to the testimony of the [Church]'s witnesses relevant to representations made by the [Church] concerning the religious nature of the schools," while the Board claimed that such inquiries were "merely" for the purpose of "clarifying" the Church's "legal position" (NLRB Brief in No. 76-1600, p. 13). Contrary to the apparent belief of the Board and the union, however, to make these assertions is to condemn rather than to justify what happened at the hearing:

> Abuses of the investigative process may imperceptibly lead to abridgment of protected freedoms. The mere summoning of a witness to testify, against his will, about his beliefs, expressions or associations is a measure of governmental interference. *Watkins* v. *United States,* 354 U.S. 178, 197 (1957).
>
> This kind of state inspection and evaluation of the religious content of a religious organization is fraught with the sort of entanglement that the constitution forbids. *Lemon* v. *Kurtzman,* 403 U.S. 602, 620 (1971).

Nor is there the slightest merit in the Board's contention that its jurisdictional criterion "requires only that the Board distinguish between religious and secular activities." (NLRB Brief in No. 76-1600, p. 10). In the first place, to classify "what is or is not religion" has been aptly described as "difficult," *Walz* v. *Tax Commission of*

New York, supra, 397 U.S. 664, 698 (Harlan, J., *concurring*). Second, the Board has no business making any such classification; efforts by the government to do so have been squarely prohibited by this Court:

> [A]part from narrow exceptions not relevant here . . . it is no business of the courts to say that what is a religious practice or activity for one group is not religion under the protection of the First Amendment. *Fowler* v. *Rhode Island, supra,* 345 U.S. 67, 70 (1953).

Involvement of the Board in collective bargaining, moreover, threatens the Church's autonomy in religious matters, since it is both "sensible and realistic," *Walz* v. *Tax Commission of New York, supra,* 397 U.S. 664, 671, to conclude that collective bargaining by school teachers will not and cannot be limited to purely secular matters. As applied to schools, "the term 'conditions of employment' has a meaning which leaves very little not subject to bargaining." Kahn, *The NLRB and Higher Education,* 21 U.C.L.A. L. Rev. 63, 167 (1973). As the Court of Appeals noted:

> "Once a bargaining agent has the weight of statutory certification behind it, a familiar process comes into play. First, the matter of salaries is linked to the matter of workload; workload is then related directly to class size, class size to range of offerings, and range of offerings to curricular policy. Dispute over class size may also lead to bargaining over admissions policies. This transmutation of academic policy into employment terms is not inevitable, but is quite likely to occur." 559 F.2d at 1123 (1977), quoting Brown, *Collective Bargaining in Higher Education,* 67 Mich. L. Rev. 1067, 1075 (1969).

Furthermore, as pointed out by the court below, (559 F.2d at 1125-26), at least four unfair labor practice charges have already been filed which squarely involve the Board in matters of religious doctrine:

(1) Failure to renew the contract of a teacher who, by marrying a divorced Catholic, had lost her good standing in the Church. 559 F.2d at 1125.

(2) Failure to renew the contract of a teacher who had taught her biology students sexual theories contrary to the Church's teachings. *Id.*

(3) Failure to renew a teacher's contract because of refusal to structure a course in religion as directed by the principal and chairman of the religion department. *Id.*

(4) Alleged anti-union activity consisting of reading to employees, at the residence of the Bishop, "a prayer entitled 'Repent Ye Sinful Children' and in reading aloud to said employees the General Epistle of Saint James, Chapter 4, Verses 1-10." This charge was dismissed after "three days of testimony and 531 pages of transcript." 559 F.2d at 1126.

Despite the fact that it "is not within the competence of the Courts to approve, disapprove, classify, regulate, or in any manner control sermons given at religious gatherings," *Fowler* v. *Rhode Island,* 345 U.S. 67, 69 (1953), it is clear that in the hearing as to the latter charge considerable testimony was devoted to the question whether St. James' writings contained doctrines construable as anti-union. As the Administrative Law Judge stated in ultimately dismissing the charge:

> Judge Wagman: Wait a minute, wait a minute. I have been persuaded by what I have heard so far that the reading of chapter four of the general epistle of St. James, verses 1 to 10 . . . does not contain a violation of the Act. I think it is protected by section 8(c)....
>
> Now, I have sat here Tuesday, Wednesday, and today's Thursday, and I have listened to all the Gen-

> eral Counsel's witnesses talk about this epistle, and I have had the thing in front of me. And nowhere do I find any threat, any promise, or benefit or reprisal, et cetera. As far as I can see, this was a true exercise of religious freedom. [Intervenor's Brief and Appendix in No. 76-1600, p. IA-2].

Contrariwise, if the Administrative Law Judge had found that St. James' Epistle *did* contain sentiments whose expression was contrary to section 8(c) of the National Labor Relations Act, presumably he would have ordered respondents to refrain from reading the offending passage, as well as other scriptures of similar tenor, to teachers at parochial schools during union representation campaigns. When one reflects that respondents are Catholic clergy exercising their religious calling, the whole episode is a stark demonstration of the impropriety of the course upon which the Board has embarked.

Further, the inevitable involvement of the Board in religious matters is apparent from its petition for *certiorari* and from its brief filed with this Court. Although it was agreed by respondents that Catholic doctrine does not oppose collective bargaining *per se* (the sole issue being whether government can *compel* the Church to bargain), the Board has undertaken to address the point, citing two papal encyclicals (*Mater et Magistra* and *Rerum Novarum*) (Petitioner's Brief, p. 25), thereby in effect asking this Court to construe the teachings of the Church on matters of labor relations.* It is clear, *a fortiori,* therefore, that

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* What is more, to rely on Catholic doctrine to imply, as the Board does, that Respondents should not have objected to its jurisdiction is to "employ religion as an engine of Civil Policy", an act condemned by Madison as "an unhallowed perversion of the means of salvation." Accord, *Engle* v. *Vitale,* 370 U.S. 421, 432 (1962).

that is exactly what the Board *will do,* and will ask the *courts* to do, as to any dispute between religious schools and their teachers in which religious doctrine is an element. Such participation in religious matters is clearly prohibited by the First Amendment:

> Neither a state nor the federal government can, openly or secretly, participate in the affairs of any religious organization or groups or vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between church and state." *Everson* v. *Board of Education, supra,* 330 U.S. 1, 16 (1946).

IV. THE CONFLICT BETWEEN THE BOARD'S ASSERTION OF JURISDICTION AND THE FREE EXERCISE OF RELIGION IS INHERENT AND CANNOT BE AVOIDED.

Finally, the foregoing conflict between the Board's assertion of jurisdiction over "religiously associated" schools and the Free Exercise Clause cannot be attributed simply to inept administration on the part of the Board. The conflict is inherent and cannot be avoided. As the Court of Appeals stated, under Catholic canon law the bishop has the absolute right and duty to administer to schools under his jurisdiction, 559 F.2d at 1122, 1123, while it is the very purpose of the National Labor Relations Act to circumscribe employers' authority by compelling collective bargaining. This Court has previously held that governmental intrusion in the religious discipline of Catholic school teachers, in the form of a statutory restriction, is unconstitutional:

> Further difficulties are inherent in the combination of religious discipline and the possibility of disagreement between teacher and religious authority over

the meaning of the statutory restrictions. *Lemon* v. *Kurtzman, supra,* 403 U.S. 602, 619 (1971).

> All who unite themselves to . . . a [church] body do so with an implied consent to . . . [its] government and are bound to submit to it. But it would be a vain consent and would lead to the total subversion of such religious bodies, if any one aggrieved by one of their decisions could appeal to the secular courts and have them reversed. It is of the essence of these religious unions, and of their right to establish tribunals for the decision of questions arising among themselves, that those decisions should be binding in all cases of ecclesiastical cognizance, subject only to such appeals as the organization itself provides for. *Watson* v. *Jones,* 13 Wall. 679, 729 (1871).

This difficulty is compounded when the Board enters the picture, since the fear of entanglement in lengthy administrative proceedings will still further chill the exercise of religious freedom. As the court below pointed out:

> If a bishop, for example, should refuse to renew all lay faculty teacher contracts because he believed that the union had adopted policies and practices at odds with the religious character of the institutions, or because he wanted to replace lay teachers with religious order teachers who had become available, under ecclesiastical law he would have the right if not the duty to take that action. Yet, under the National Labor Relations Act, he might well be found guilty of an unfair labor practice. . . . The real difficulty is found in the chilling aspect that the requirement of bargaining will impose on the exercise of the bishops' control of the religious mission of the schools. To minimize friction between the Church and the Board, prudence will ultimately dictate that the Bishop tailor his conduct and decisions to steer far wider of the unlawful zone of impermissible conduct (*Speiser* v. *Randall,*

> 357 U.S. 513, 526 (1958)). If, for example, a teacher should give a strong pro-union speech at a meeting one week and the next week would advocate the cause of birth control to his or her students or favor the availability to poor people of abortion, the bishop would be confronted with a choice of foregoing his right to discharge the heretical employee or do so at the risk of a protracted and expensive unfair labor practice proceeding before the Board which would certainly in part involve the Church's religious policies and beliefs. 559 F.2d at 1124.

All of this is directly contrary to the well-established principle that civil tribunals may not review or overturn the decisions of religious organizations "of hierarchical polity on matters of discipline, faith, internal organization, or ecclesiastical rule, custom or law." *Serbian Eastern Orthodox Diocese* v. *Milivojevich,* 426 U.S. 696, 713 (1976); *Presbyterian Church* v. *Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 450 (1969).

Nor can this conflict be avoided by the Board's argument that its role "would be limited to a determination whether the employer's alleged reason for the discharge was the actual one." (Petitioner's Brief, p. 30). First, as the record in this case abundantly demonstrates, the Board *does* not and *cannot* so limit its inquiry.

Even if the *inquiry* could be limited, however, any *decision* necessarily has impermissible religious implications. In *Nazareth Regional High School* v. *NLRB,* 549 F.2d 873 (2d Cir. 1977), for example, the Board sought enforcement of an order based on a finding that a parochial school had committed an unfair labor practice by refusing to renew the contract of a teacher of religion. The school asserted that it had not renewed the teacher's contract "because

of his immature behavior and his failure to conform to Catholic doctrine in teaching his religion course," 549 F. 2d at 882, and not because of anti-union motivation. Inherent in the Board's finding that anti-union motivation was a "substantial factor" in the discharge, 549 F.2d at 882, was its rejection of the Church's claim that the teacher's conduct "rendered him unfit for future employment," on theological grounds. (See Petitioner's Brief, p. 45). Such a finding violates the principle that the government is not a fit judge of religious doctrine:

> . . . [T]he bill implies either that the Civil Magistrate is a competent Judge of Religious Truth; or that he may employ religion as an engine of Civil policy. The first is an arrogant pretension falsified by the contradictory opinions of rulers in all ages, and throughout the World. The second an unhallowed perversion of the means of salvation. Madison, *Memorial and Remonstrance, supra,* quoted at 330 U.S. 67.

Or, as this Court said in *Watson* v. *Jones,* 13 Wall. 679, 733-4 (1871):

> If the civil courts are to inquire into all these matters, the whole subject of the doctrinal theology, the images and customs, the written laws, and fundamental organization of every religious denomination may, and must, be examined into with minuteness and care, for they would become, in almost every case, the *criteria* by which the validity of the ecclesiastical decree would be determined by the civil court. This principle would deprive these bodies of the right of construing their own church laws, would open the way to all the evils which we have depicted as attendant upon the doctrine of Lord Eldon, and would, in effect, transfer to the civil courts where property rights were concerned the decision of all ecclesiastical questions.

Finally, the Board has not even begun to grapple with the question of what *relief* it might grant an employee discharged on *both* theological *and* anti-union grounds. Under section 10(c) of the Act, 29 U.S.C. §160(c), for example, the Board can only order reinstatement if it finds that to do so will "effectuate" the policies of the Act. Where the employee is guilty of egregious offenses, he will not be reinstated even if his discharge was in fact illegally motivated. See, e.g., *NLRB* v. *Breitling,* 378 F.2d 663, 664 (10th Cir. 1967) ("We cannot see that the reinstatement of a confessed thief effectuates the policies of the Act."). But what will the Board do with the teacher whose discharge was motivated in part by anti-union animus, but who is also claimed to be a heretic? If reinstatement is *ordered* without a full inquiry by the Board into the nature and accuracy of the theological charge, then the effect of the Board's act is to flatly contradict a Church official on a matter of Church doctrine. The Board has no such power:

> The fallacy fatal to the judgment of the Illinois Supreme Court is that it rests upon an impermissible rejection of the decisions of the highest ecclesiastical tribunals of this hierarchical church upon the issues in dispute . . . *Serbian Eastern Orthodox Diocese* v. *Milivojevich, supra,* 426 U.S. 696, 708 (1976).
>
> If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, religion, nationalism or other matters of opinion or force citizens to confess by word or act their faith therein. *Board of Education* v. *Barnette,* 319 U.S. 624, 642 (1943).

On the other hand, if the Board *denies* reinstatement without inquiry, in an attempt to "accommodate the schools'

religious purpose,'"* then the Board is allowing Church doctrine to dictate how the policies of the Act are to be effectuated, thereby clearly violating the Establishment Clause. As this Court said in *Presbyterian Church* v. *Blue Hull Memorial Presbyterian Church,* 393 U.S. 440, 451 (1969):

> [T]he civil courts could not review and enforce the church decision without violating the constitution. The First Amendment prohibits a state from employing religious organizations as an area of the civil judiciary to perform the function of interpreting and applying state standards.

It is therefore apparent that if the Board takes any action without a full inquiry it violates the Constitution no matter what form its action takes. But if the Board *conducts* such an inquiry, it may in fact be conducting a heresy trial before an Administrative Law Judge:**

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* At oral argument before the Court of Appeals, counsel for the Board suggested that some "accommodation" might be both appropriate and possible, 559 F.2d at 1128. The court below observed:

> "We fail to comprehend the real possibility of accommodation in the present context without someone's constitutional rights being violated which in turn would seem to preclude the possibility of accommodation as an answer to the obviation of the religious entanglement problem." 559 F.2d at 1130.

** The Board's attempt to equate the resolution of the problem of the teacher who engages in union activities and also espouses unorthodox religious views with the determination as to whether a belief is sincerely held (Petitioner's Brief, p. 31) is completely inappropriate. Rather than assess the *sincerity* of beliefs espoused either by the Church or by a discharged teacher, the Board's role would be to determine the *substance* of such beliefs, and whether they conflict sufficiently to justify the teacher's discharge.

> The religious views espoused by respondents might seem incredible, if not preposterous, to most people. But if false doctrines are subject to trial before a jury charged with finding truth or falsity, then the same can be done with the religious beliefs of any sect. When the triers of fact undertake that task, they enter a forbidden domain. *United States* v. *Ballard,* 322 U.S. 78, 87 (1944).

Finally, even if the Board could conform its administrative conduct to the requirements of the Constitution, that would be insufficient to justify its assumption of jurisdiction. Administrative practices are of course subject to change, and a series of appeals to the courts by the Church against expanding encroachment by government is no proper remedy for such a clear constitutional evil:

> [I]t is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of [the] noblest characteristics of the late Revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences in the principle, and they avoided the consequences by denying the principle. We revere this lesson too much, soon to forget it. Madison, *Memorial and Remonstrance, supra,* quoted at 330 U.S. 65.

Religious institutions should be left alone to the utmost possible extent, not subjected to continual pressure:

> [T]he peoples' religion must not be subjected to the pressures of government for change each time a new political administration is elected to office. *Engel* v. *Vitale,* 370 U.S. 421, 430 (1962).

Or, as the Court said in *Kedroff* v. *St. Nicholas Cathedral,* 344 U.S. 94, 116 (1952):

> The opinion [in *Watson* v. *Jones*] radiates . . . a spirit of freedom for religious organizations, an independence from secular control or manipulation—in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.

It is that spirit, and the constitutional principles which guarantee its preservation, which the assertion of jurisdiction by the Board has violated.

CONCLUSION

For the reasons stated the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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